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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1194.

MYLES F. HEFFERNAN,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Opinions Below.

The Opinion of the Supreme Judicial Court of Massachusetts (App. *infra*, p. 37) is reported at Massachusetts Advance Sheets (1966) pp. 1-8.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under 28 U.S. Code, § 1254 (3).

Questions Presented.

1. Was there suppression of evidence by a prosecuting official?

2. Did the refusal of the trial judge to hold an evidentiary hearing on the motion for new trial violate the petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States?

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL LAWS OF MASSACHUSETTS, CHAPTER 268A, SECTION 2.

(*b*) Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility * * * shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than three years * * * [As inserted by St. 1962, c. 779, § 1.]

Statement of the Case.

On January 4, 1965, the petitioner was put to trial in the Superior Court for the County of Middlesex before Bolster, J., sitting without jury, on an indictment charging that he had asked for and received something of value in exchange for performing an official act (App. 33). On January 5, 1965, Judge Bolster found the petitioner guilty

and imposed a fine of $100 (App. 34). The petitioner appealed the conviction (App. 34) and also filed a motion for a new trial (App. 34). The petitioner alleged in his motion for a new trial that Major Robert D. Murgia, a prosecuting official, suppressed information that an important witness had substantially changed his story. The appeal of the conviction and the denial of the motion for new trial were argued before the Supreme Judicial Court on October 4, 1965, and decided on January 4, 1966 (App. 37).

Argument.

I. There was No Suppression of Evidence by a Prosecuting Official.

The petitioner alleges that Major Robert D. Murgia was present during the trial when Thomas M. Price gave testimony inconsistent with a story previously told to the investigating officer in his presence. To support this allegation the petitioner offers an affidavit by Sergeant First Class Wayne C. Kruntorad (App. 27). It must be noted that this is the only support offered for this allegation, and it is contradicted by the affidavit of the witness Price (App. 28).

The respondent expressly denies the allegation set forth by the petitioner; however, assuming it to be true, there was no violation of the petitioner's constitutional rights.

The petitioner alleges that Major Murgia was a prosecuting official, and therefore was under a duty to make known to the prosecutor the discrepancy in the testimony of the witness Thomas M. Price. Major Murgia was the petitioner's superior officer. In exercising his duty he ordered an investigation into the circumstances surrounding the case (App. 6). There is no indication that Major Murgia conducted the investigation.

Clearly, it cannot be said that Major Murgia was a prosecuting official because he happened to be the petitioner's superior officer. It is true that he testified at the trial as a Government witness (App. 6). However, his testimony merely related to his conversation with the petitioner, the report submitted to him by the petitioner, and his recommendations to his superior officer.

The petitioner has failed to show that the Commonwealth or any of its agents, knowingly or unknowingly, permitted the use of false testimony. Indeed, the affidavit of the witness Price (App. 28) shows that he is still consistent with his testimony at the trial.

In all of the cases cited by the petitioner the evidence suppressed was material to the main issues being tried. In the instant case we have the benefit of the trial judge's statement that Price's testimony played no part in the finding (App. 32, 43).

There is no evidence that the Commonwealth withheld, suppressed or concealed any facts or testimony which the petitioner was entitled to receive or have disclosed to him. The Commonwealth's conduct comported with all controlling constitutional and other standards and criteria of fairness, propriety, ethics and due process.

II. The Refusal by the Trial Judge to Hold an Evidentiary Hearing on the Motion for New Trial did Not Violate the Petitioner's Right to Due Process under the Fourteenth Amendment to the Constitution of the United States.

The petitioner has no right to insist that oral evidence be heard upon a motion. *Commonwealth* v. *Millen,* 290 Mass. 406, 410. It is the law of the Commonwealth that motions for new trial and hearings thereon are addressed to the discretion of the trial court. *Commonwealth* v. *Sitko,*

346 Mass. 765. *Commonwealth* v. *Slaney,* 345 Mass. 135, 142. *Commonwealth* v. *Rodriguez,* 334 Mass. 703, 704. *Commonwealth* v. *Galvin,* 323 Mass. 205, 220.

Discretion should not be exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances. See *The Styria* v. *Morgan,* 186 U.S. 1, 9. Indeed, the trial judge did not act arbitrarily in the instant case. He ruled that, "unless those affidavits indicate to me in my discretion the desirability of taking evidence, I shall not do so" (App. 17). Therefore the trial judge did not merely deny a hearing. He denied the hearing based upon the fact that the affidavits did not indicate that it would be desirable to take evidence.

The findings by the trial judge that the affidavits and allegations of the petitioner did not indicate the desirability of taking evidence were not an abuse of discretion.

The basis for the motion for new trial is the alleged suppression of information by a prosecuting official. Where the trial judge states that the evidence involved in this allegation was not controlling and would not have affected the result (App. 32), it cannot be said that the denial of an evidentiary hearing on the motion was an abuse of discretion. Indeed, under the circumstances such a hearing would have been a waste of time.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General,
By WILLIE J. DAVIS,
Assistant Attorney General.

Appendix.

Testimony of Robert D. Murgia

Direct Examination by Mr. Conn:

Q. State your name, please? A. Robert D. Murgia.

Q. Your occupation? A. State police officer.

Q. Your rank, sir? A. Major.

Q. And with reference to the first part of November, 1964, as a result of conversations with subordinate officers in the state police, did you have occasion to order an investigation into the circumstances surrounding Trooper Myles Heffernan's activities on November 1, '64? A. Yes, sir, I did.

Q. And as a result of those investigations did you have occasion to personally confer with Trooper Myles Heffernan? A. Yes, sir, I did.

Q. And what was the date of your conversation with the trooper? A. It was—the date of my conversation with Trooper Myles Heffernan was Friday, November 13, 1964. I had accompanied Lt. Cote to the provost marshal's office earlier in the day, and I was present when Lt. Cote spoke with Private Travis Stone and Private First Class Price. Lt. Cote and myself returned to the Concord Barracks late in the afternoon. We remained at the Concord Barracks, at the state police barracks at Concord, approximately an hour or so, and Lt. Cote, Trooper Heffernan, and myself returned to the provost marshal's office in Fort Devens.

Q. Did you have conversation in the cruiser? A. Yes.

Q. Would you relate that, please? A. Upon departure from the provost marshal's office in Fort Devens, as Lt. Cote and myself were entering the car Trooper Heffernan turned to me and said "I want to apologize for embarrassing you and Lt. Cote." We departed from the premises of the federal reservation en route to the Concord Barracks. I had conversation with Trooper Heffernan again.

Q. What was that conversation, major? A. At this time I said to Trooper Heffernan, I said that "You are a consistent nonworker—

Mr. Bailey: I object to that. It is known to be improper by my brother, obviously prejudicial and irrelevant.

The Court: That may be stricken out. That has no bearing—

The Witness: I called to his attention the fact that—

Q. With reference—may I interrupt you here, major, since my brother is a little upset at the area of inquiry.

Mr. Bailey: I ask that that remark be stricken, too, your Honor.

The Court: It doesn't matter to me whether you are upset or not.

Mr. Bailey: I understand that, your Honor, but for the record I think it should be. This is deliberately prejudicial.

Q. Could we please confine ourselves, major, to the conversation relative to the 1st of November incident between the trooper and Private E-2 Stone? A. Well, at that time I said to Heffernan, I said, "You came across a legitimate arrest and you failed to take proper action."

Q. Did he respond? A. Yes, he did.

Q. What did he say? A. He said to me "Captain," he said, "I'm a hundred per cent wrong. I know I'm wrong. I'm a hundred per cent wrong." He reiterated that remark. When we arrived at the Concord barracks, which was approximately at 8 o'clock in the evening—it was still Friday, November 13, 1964. Prior to my departure from the barracks I ordered Trooper Heffernan to submit a full report in writing. I wanted the report to contain his complete activities concerning his conduct on Friday, November 13, 1964. I said to Trooper Heffernan, "I want that report on my desk at Framingham at 9 o'clock Monday morning, which was November 16th, 1964.

Q. All right. Now, major, whether or not when you arrived at work in Framingham on November 16, 1964, a report was on your desk submitted by Trooper Heffernan? A. Yes, sir, it was.

Q. And do you have in your possession that report? A. Yes, sir, I do.

Q. May I now see it, please?

Mr. Bailey: I understand this report relates to activities of Trooper Heffernan on November 13th?

Mr. Conn: November 1st, I believe.

The Witness: November 1st, yes.

Mr. Bailey: Your Honor, am I entitled to a voir dire on the admissibility of this? It is a two-page written statement in the form of a report, signed by the defendant and submitted under orders from a superior officer at a time when the defendant was under investigation for an alleged crime.

The Court: Well, I suppose the superior officer has a right to order an inferior personnel person to submit a report at just about any time, don't they?

Mr. Bailey: No, certainly not, your Honor, not when he is a prospective defendant in a criminal case.

The Court: If we argue the thing, we don't have to clear the courtroom. There's no jury here. This is the same as a voir dire.

Mr. Bailey: Yes. Just a couple of questions, if I may.

Cross Examination by Mr. Bailey:

Q. Captain, at the time you asked Heffernan for this report had you made decision as to whether or not to take action against him? A. No, sir, I had not.

Q. You had not? A. No, sir.

Q. So at this time you still had an open mind on the issue? A. I certainly did.

Q. And you had made no decision as to whether or not Heffernan should be prosecuted within or without the

department as a result of this? A. Not at that time, no, sir.

Mr. Bailey: All right. I will withdraw my objection, if that's the fact.

The Court: All right.

Mr. Conn: I offer this.

The Court: Any objection, Mr. Bailey?

Mr. Bailey: No. On the basis of the voir dire I withdraw my objection.

[Report of November 14, 1964, marked Exhibit No. 5.]

Direct Examination Continued by Mr. Conn:

Q. Was that signed? A. Yes, sir, that was signed.

The Court: You go ahead and I will catch up with the reading of this after 4 o'clock.

Mr. Conn: I have no further questions of the major.

Cross Examination by Mr. Bailey:

Q. Was it you who assigned Lt. Cote to this case? A. Yes, upon instructions from my superior officer, Thomas Murphy.

Q. But the report was made to you? A. Yes, sir.

Q. And did you receive a report from Lt. Cote? A. Yes, sir, I did.

Q. Are you able to identify Exhibit A for identification as the report submitted to you on November 16, 1964, by Lt. Cote? A. Yes, sir. That is a copy of his report to me.

Q. And did you assign him to this case for the purpose of getting the facts and his recommendations and conclusions? A. Yes, sir. I assigned him to that investigation on orders of my superior officer Col. Murphy. It is customary for the investigating officer to submit his recommendations also along with the report.

Q. Did you receive those recommendations? A. The recommendations that are in Lt. Cote's report, yes, sir, I did.

Q. Was it your decision to reject them? A. No, sir, it was not.

Q. It was some other person in the department? A. Yes, sir. I made my own report to Col. Murphy.

Q. I see. And did you concur in the recommendations with Lt. Cote? A. I concurred and I added some, sir.

Q. So, I take it, you recommended that this case not be prosecuted?

Mr. Conn: I pray your Honor's judgment.

The Witness: I recommended that this case be turned over to the District Attorney's Office. I was instructed to draw up charges and specifications for a departmental court marshal trial, which I did. I submitted those charges and specifications along with my report to Col. Murphy.

Q. But you did overrule the recommendation of Lt. Cote, who made the investigation, that the matter not be prosecuted because of discrepancies in the complainant's statement? A. I overruled him in part.

Mr. Bailey: Thank you.

Mr. Conn: In view of my brother's last statement as to this, it becomes apparent that a memorandum of law is a will-o-the-wisp, in view of what—

The Court: In any event, when I'm sitting without jury and something isn't admissible, it strikes me, Mr. Bailey, as a little unusual to suggest in this trial—if a judge looks at something that is clearly inadmissible, he's not presumed to be able to put it out of his mind.

Mr. Bailey: I understand that. The point is that I have read the memorandum and—

The Court: I am the one that's in the difficult position.

Mr. Conn: I would like to offer it now in evidence, your Honor, in view of the statement—

The Court: I'm not paying any attention to this mistrial business, but I may consider this further bit of evidence as to its admissibility. It is close to 4 o'clock, and I can pass on it at 10 o'clock tomorrow morning. I have serious doubt. There's no point in doing something that will require a second trial. A quick look at the books will save that possibility. I'm not going to look at it tonight. I'm going to wait and see whether or not it's admissible. If admissibility depends on contents, I will look at it fast and maybe admit part and exclude part. I think both of you are stuck with that.

Mr. Bailey: Thank you.

Mr. Conn: Thank you, your Honor.

Mr. Bailey: No further questions.

Mr. Conn: Thank you, major. You may step down.

[Witness excused.]

Mr. Conn: Your Honor, that would conclude the Commonwealth's case, and the Commonwealth rests.

The Court: Except for the ruling on admissibility of the report.

Mr. Barton: We will waive an opening, your Honor.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT

CRIMINAL I

COMMONWEALTH

VS.

MYLES F. HEFFERNAN

Motion for a New Trial.

Now comes the defendant in the above-entitled case and moves that the finding of guilty be vacated, or, in the alter-

native, that a new trial be granted, on the following grounds:

(1) There was not sufficient evidence to sustain the charge framed in the indictment presented by the state, the defendant, or both.

(2) The finding of the Court was against the weight of the evidence.

(3) The finding of the Court was predicated upon evidence which would have been seriously impeached were it not for the suppression of certainly highly relevant evidence by one who was a party to the prosecution.

(4) Justice has not been done and cannot be done upon the judgment of conviction now entered against the defendant.

WHEREFORE, the defendant respectfully requests that this Honorable Court:

(a) Hold a hearing and receive evidence therein, to determine whether or not the within allegations are true;

(b) Vacate the finding of guilty, and substitute therefor a finding of "Not Guilty"; or,

(c) Grant a motion for a new trial.

By his attorneys,

F. LEE BAILEY

Filed Jan. 7, 1965 ROBERT A. BARTON

Transcript of Informal Hearing on January 8, 1964, Relative to Motion for New Trial.

The Court: I wish at this point, just to bring the record up to date, to make a statement: On the day before yesterday—Wednesday January 6th—when I arrived at the Boston Courthouse, shortly before 4 o'clock, I was met by Mr. Bailey and Mr. Barton, counsel for the defend-

ant, who expressed a wish to see me on an important matter.

I went into conference with them. Mr. Bailey stated, as I remember it, that he had recently discovered some evidence that was of importance in this case. I asked him if he had informed Mr. Conn about it. He said he had tried to reach Mr. Conn and had been unable to do so. I suggested to Mr. Bailey—and I think he agreed with me—that any matter involving newly discovered evidence would properly be raised on a motion for a new trial or some other sort of motion which would raise it appropriately. And at that time it was left that he would get in touch with Mr. Conn and would, if he saw fit, prepare a motion as suggested.

Now, is there anything more of importance that transpired except that, Mr. Bailey?

Mr. Bailey: Yes, your Honor. For the record, I believe that when we approached your Honor in the Judges' Lobby in Suffolk it was for the purpose, as I recall, of asking that an early hearing be held on this new matter, but the text of the matter was not discussed. Your Honor was not informed as to what evidence we intended to present. This was within a few minutes of the time I learned what the evidence was.

Late that same day I did talk to Mr. Conn and informed him in detail of exactly what was entailed, and yesterday late in the afternoon we filed this motion for new trial with an offer of proof in support of showing what we would present if the hearing were granted, and a copy was left with Mr. Conn, which I believe he duly received.

Mr. Conn: I did duly receive the copy and Mr. Bailey did communicate with me.

The Court: I think you said something about newly discovered evidence having something to do with Fort Devens, and I suggested that before we consider that fur-

ther that we would wait until we had Mr. Conn in attendance.

Mr. Bailey: Yes, your Honor, that is correct.

The Court: So that there's that part. Now, I have been presented with a motion for a new trial filed yesterday, January 7, together with an unsworn statement by counsel for the defendant, which I have read. Because no affidavits have been filed, which I am entitled to have, Mr. Bailey at the Wednesday conference, I believe, said that he hadn't had time to get an affidavit, and I suggested that he file some sort of statement such as has been filed for my preliminary view, so to speak, after Mr. Conn had seen a copy. So I do not regard this as a hearing on this new motion, although I am quite prepared to act with as much dispatch as may be necessary.

But, however, in order to simplify matters, Mr. Bailey, with respect to Ground 3 of your motion for a new trial, which is: The finding of the Court was predicated upon evidence which would have been seriously impeached were it not for the suppression of certainly highly relevant evidence by one who was a party to the prosecution.

I gather from your supporting statement that that party to the prosecution was Major Murgia.

Mr. Bailey: It was indeed.

The Court: And nobody else?

Mr. Bailey: That's right, your Honor.

The Court: Now, I also gather from your supporting statement that the evidence which would have been impeached except for the alleged suppression was that Price had stated both on November 13, 1964, and on December 18, 1964, that he never saw the cruiser move at all before he last saw it, and that on January 4th, 1965, prior to his testimony before me, he stated that he was not sure whether he had seen the cruiser move—"I think it did move"—and the quote is lifted from your statement.

Now, that is the sum and substance, is it?

Mr. Bailey: I think it is somewhat narrower than that, your Honor. The reference to Major Murgia relates only to November 13th. The major was described as a party to the prosecution because—

The Court: No. I was asking you, Mr. Bailey—

Mr. Bailey: I understand.

The Court: —if the alleged evidence which would have been impeached was the evidence of Price and only of Price, and the impeachment would consist of the fact that Price allegedly testified on those two dates I mentioned—that he never saw the cruiser move at all before he last saw it, and that he stated here in the courthouse, prior to his testimony, that he was not sure whether he had seen the cruiser move—"I think it did move."

Mr. Bailey: The suppression relates only to the statement made on November 13th, but not to what was said in the courthouse. We do not contend that Mr. Conn expressed anything and—

The Court: I understand. I'm sure he didn't.

Mr. Bailey: —our contention is this: A man that was familiar with the case, conducted the investigation, sat in the courtroom during testimony, testified himself. We contend he had a duty to disclose a statement flatly contradicting testimony Price gave, which was the only evidence to impeach the defendant's testimony, other than the complainant himself, that Major Murgia knew it when he was standing here—that he should have at least told Mr. Conn about it and let him make the decision as to whether or not the defendant was entitled to that evidence, and that he did not, and if we were granted a hearing, I would show that Major Murgia did hear that statement, and it is conceivable that he didn't appreciate its significance at that time, and that because of his experience as a police officer, it is inconceivable that he

sat in the courtroom and heard Price, say, call Heffernan a liar, that he did not appreciate the significance of the change in position which Price had undergone as a percipient witness.

The Court: I think before I—well, yes, now, but this is the only evidence that you claim was suppressed. Is that it?

Mr. Bailey: The failure of the major to disclose the prior inconsistent statement. That is what I relate to and that alone—

The Court: Yes. All right.

Mr. Bailey: —under the circumstances.

The Court: Well, we have that narrowed down. Now, I think before I even hear the motion officially, so to speak, that I should be able to see a transcript of Price's testimony. I made notes but necessarily only notes and not verbatim notes, and therefore—the testimony wasn't long and we should be able to have a transcript before too long, I think, of that, or I should be able to.

Mr. Bailey: I thought of asking for that for this hearing but we did have a time limit.

The Court: Mr. Conn, I think you should have an opportunity to be heard. Bear in mind, gentlemen, this is not a formal hearing on this motion, because I wish before I even have a formal hearing, much less rule, I want to see a transcript of Price's testimony at the trial.

Mr. Conn: Your Honor, relative to the procedure at this point, of course, I would be perfectly in accord with your suggestion or statement that you'd like to see the transcript of Mr. Price's testimony, and I take it, your Honor, from your remarks that you do not want to hear from our office at this time relative to the merits of the motion that Mr. Bailey has filed.

I would like to make one point, however, your Honor, relative to a preliminary matter which might help the

Court and might speed the wheels of justice, so to speak—that I think that I would stipulate that Mr. Price did in fact testify he saw the cruiser move—

Mr. Bailey: Unequivocally.

Mr. Conn: —unequivocally. This is my recollection of the testimony—

The Court: I understand so, too.

Mr. Conn: It is my recollection and I think it's Mr. Bailey's and Mr. Barton's. This was the statement, and if this does in fact expedite, your Honor, what you have to consider in this hearing, a stipulation by the Commonwealth to that effect I'm sure it would be in order at this time.

The Court: Well, it might expedite the situation, but I don't like to expedite situations in a criminal case, even one with less seriousness than this, if by expedition the rights of either the defendant or Society are prejudiced.

Now, in addition, Mr. Bailey, I think I will, in the first instance, require such affidavits as you think are necessary to portray the situation before I act at all, and unless those affidavits indicate to me in my discretion the desirability of taking evidence, I shall not do so. So I suggest that you get whatever affidavits you think are necessary in this matter and file them at such time as you think you can do it conveniently.

I will try to see if I can set this down at some lull in the two murder cases that start next Monday. I could perhaps do it on Tuesday afternoon, because the plan of procedure, roughly, is to hope to have a jury empaneled by next Tuesday morning and then go on a view and get back, presumably, around 4 o'clock.

Mr. Conn: Late Tuesday afternoon, your Honor?

The Court: Tuesday at 4 or as soon thereafter as—

Mr. Conn: Your Honor, may I make one observation here?

The Court: Anybody can make any observations they wish.

Mr. Conn: Thank you, your Honor. I'm just thinking out loud, but it has occurred to me—you mentioned the possibility of testimony being taken. Procedurally, would it not perhaps eliminate the necessity of the taking of testimony if the District Attorney's Office was present and this was, in essence, a joint affidavit, whereby both Mr. Bailey, representing the defendant and myself representing the Office of the District Attorney could participate and be a part of the compiling of an affidavit? That would eliminate the necessity, I would think, of some future time requiring Price, if he is the key man, to come forward and take the stand and again testify under oath.

If we could take the affidavit in the nature of a deposition, your Honor, have a notary do it according to procedure, and have us both present and an opportunity to interrogate—procedurally, I just suggest this for what it is worth.

The Court: Let me make a counter-suggestion, Mr. Conn, and also Mr. Bailey and Mr. Barton: Anything that you two can work out to facilitate the matter would in this case be agreeable to me.

Mr. Bailey: I think, your Honor, Mr. Conn's suggestion is both expeditious and very fair. What occurs to me is this: We are appealing to about the broadest discretion your Honor can ever exercise, and Lord only knows what might influence that. Perhaps seeing the witnesses would have some bearing. It must have had some bearing on your findings at the trial.

Now, when you ask me to produce affidavits you raise this problem: In the first place, I would not expect your Honor to rule upon affidavits, so this is an interlocutory step principally to assure the Court that the evidence will be forthcoming. Second, I am dealing mostly with mili-

tary people. That is to say, Sgt. Druntorad and Sgt. Wallace of the CID and Thomas Price. I can furnish you Mr. Bloomfield's affidavit by simply having him notarize this offer of proof, because the information comes principally from him—he made the investigation. The offer of proof is intended to assure the Court that I, as counsel will present this evidence if you will hear it.

I would almost rather have you see the witnesses in flesh and blood and have Price stand up and tell you, your Honor, that he does not now know whether that car moved or not and is unable to say. As to what he told Mr. Conn, I have known Mr. Conn for a long time, and what he says as counsel in court without an affidavit is sufficient for me relative to his initial conversation with Price on the morning of the trial, the day it began, as to whether or not his initial response to the question was "I'm not sure," because I feel that this is critical. But we are in a bit of a fuzzy area, your Honor, and that is why I say I am appealing to your broad discretion.

It occurs to me—

Mr. Conn: Your Honor, may I make one observation—

The Court: Let me say this. I know you feel I have broad discretion, and I am trying to keep my discretion as broad as I should, and I think in this case we have to follow the rules, so we don't get into difficulties which don't in any way affect the merits of the situation. I think if we view the rule and the decided cases thereunder and have the affidavits first, then perhaps I can rule on those. Certainly I shouldn't expect a witness to go further than he does in an affidavit, and—

Mr. Bailey: Well, I don't know whether the military people, as a matter of policy, will give me affidavits, your Honor, without a long-chain-of-command problem. I know they have agreed to testify before your Honor, and I am confident that their testimony will fit the offer of proof.

The Court: Well, do you know, Mr. Conn, whether these allegations—I will call them—are based on Mr. Bloomfield's report to Mr. Bailey are correct?

Mr. Conn: Of my own knowledge, your Honor, I was not present when Mr. Bloomfield interrogated Price. I can only testify from my own knowledge relative to what occurred on January 4, 1965. I could testify to the effect that I did in fact have a conversation with the Witness Price. I could testify to the effect that in the course of the conversation Price, as I have indicated, I believe, was vague to a point, that Price was asked by me to "Please search your memory," and he did. And it was also told to me—and I will say unequivocally, and I think Mr. Bailey will agree—"All I want from you, Mr. Price, is the truth," and Price looked at me and said, in my company and in the company of Stone, "I think the car moved," and I believe those were his words.

Your Honor, I have one point that is bothering me about this procedure, and I have not mentioned it because of statements made from the bench by you and statements of my brother, Mr. Bailey. Our office has one position, your Honor, that I would respectfully request the Court to rule on, in view of the form of the motion.

It is my understanding, in this area, that we have to have something which is in the nature of newly discovered evidence to get this matter properly before the Court. I direct your attention to the attendant affidavit or statement, if you will, rather than call it an affidavit, filed by counsel for the defendant—

The Court: It's not an affidavit.

Mr. Conn: It's not an affidavit.

Mr. Bailey: It wasn't intended to be.

Mr. Conn: Right. —where it is indicated that this inconsistency was also brought forth on December 18, 1964, in the presence of Daniel Bloomfield, Jr., whom I think

Mr. Bailey will concede was a licensed investigator in the employ of counsel for the defendant.

This means, your Honor, that the discrepancy in the testimony of Price on the stand, as opposed to the statement made on December 18, which was the same as the statement made on November 13, was in fact in the possession of the defendant or his counsel, which, of course, is the same, and therefore, your Honor, from the particulars of the motion and the attendant statement filed with it I fail to see how the rule is complied with. I fail to see how there is in fact newly discovered evidence contained, and I would most strenuously urge to the Court that there is nothing showing apparent on the face of anything before the Court to even go into a hearing on it.

The Court: Well, that may or may not be so, Mr. Conn, but I think that in a criminal case before I rule even on that suggestion I should have the benefit of, one, a transcript of Price's testimony, and, two, such affidavits as Mr. Bailey and Mr. Barton can produce to enable me to look into them and see whether or not in my opinion there is any need for me to have a further hearing on the motion.

Mr. Conn: Your Honor, I only suggest this just for the purposes of the record. This, of course, I realize would have really, in essence, more properly be advanced when you say to myself, as representative of the Commonwealth, "Mr. Conn, I will hear argument," after hearing on whether or not this motion should be allowed. But it struck me it was also a little tainted with preliminary and I should advance it at this point.

The Court: I stated myself, Mr. Conn, that this is not a hearing on the motion.

Mr. Conn: Yes, your Honor, you did.

The Court: And one reason it's not a hearing on the motion is that I didn't set it down as such. Another

reason is that there is no affidavit here which would warrant a full hearing at this time, and there will be a hearing on the motion at such time as it is convenient for you gentlemen.

Mr. Conn: Certainly, your Honor.

The Court: Now, bearing in mind Mr. Bailey's suggestion that he may encounter a little delay—put it that way—in obtaining any affidavit he thinks necessary, why don't we leave it that when you gentlemen are ready I will make myself available at the first available opportunity, even if it's at 5 o'clock some afternoon or 7 o'clock some morning. I don't wish to delay a hearing where you requested some dispatch because of any personal inconvenience to me.

Mr. Bailey: I understood this correctly, I believe, to be a hearing on what would take place in a hearing on the merits, if such a hearing were held, and I think it's just that, and for that reason I filed before your Honor an offer of proof, as I thought I was supposed to do. But there are a couple of things that I should like to resolve, if I can, before we take the next step.

First, as I said, I am not going to ask Mr. Conn for an affidavit. The offer of proof recites that Price's first statement to him, which we got from Price, of course, was, "I'm not sure," and that Stone then chimed in. And I think Mr. Conn can tell us whether his recollection supports that or not.

Second, if the military persons, for reasons of policy, are unable to subscribe to affidavits without a long rigmarole, I shall submit, which is perhaps the best thing I can do, Mr. Bloomfield's affidavit saying what they told me.

I rather doubt that I am going to be able to get Price's affidavit, although I may well. I will try.

I think there's nothing in the motion saying we have newly discovered evidence as such, but, as your Honor

well knows, the statute allows several other grounds for the granting of a new trial, and these are alleged. If the evidence is not newly discovered, then the burden definitely is going to be upon counsel, as I shall show.

The third matter—it is my feeling, from past experience and from my understanding of the law in motions for a new trial, especially where this Court sat without jury and doesn't have to determine what a jury might have done but what the Court would have done, the rules should be relaxed to the extent that we should be allowed to show the inconceivability, as a matter of human fact, of this officer as saying "I want two fifths of Canadian Club." If it is demonstrated before your Honor that there are people who have offered this officer gratuities for strictly legal acts, which were kindnesses on his part, and were refused unequivocally because, "I don't take presents. It is against policy," well, I think then your Honor might have a little more difficulty in believing that he solicited such a bribe in this case.

The Court: Well, that relates to the statements in your—

Mr. Bailey: Yes, it does.

The Court: —offer of proof, which, as you say, embraces facts that are inadmissible in trial, and I don't see why I shouldn't treat that myself the same way I would if there had been a jury. I was the judge and the jury by selection, and I have to decide. When it comes to a question of sentence—I can let the rules of evidence go by the board. So far as the sentence went, I assume everybody was reasonably satisfied, but when it comes to a trial I don't think we vary, do we, the rules of evidence that normally apply in criminal cases? I shouldn't be disposed to do so unless you can point out some authority that says I should.

Mr. Bailey: Well, the authority I have, your Honor, is that you have a broad power to search the record to

determine whether or not justice has been done and consider extrinsic evidence. I know we are bound by formal rules. I don't agree with them all, but I don't think I can necessarily change them on an appeal, but where you are a consolidated operator as between the law and the facts here it seems to me if two minutes before this happened Heffernan turned down two jugs from an old lady for helping her across the street and then asked them from this kid, as alleged, your Honor would be quite correct in considering that.

This sentence was handed down with your finding, your Honor. This man is, by statute, destroyed. He is out, and I think that in view of that sentence and finding, as a practical matter, your Honor has the power, even though he may later reject the evidence, to hear anything we have to offer tending to show that it is unlikely the defendant would have done this.

The Court: I can say right now, Mr. Bailey, to save you further mental turmoil, that I am not under any circumstances—unless, as I say, you call my attention to some authority that I at the moment don't know of—I am not under any circumstances going to take evidence on that aspect. I think that would be—it would set a very bad precedent. So we will go ahead on the relatively narrow scope of this, which, as I understand, is now strictly limited to this question of whether or not Price saw the police cruiser move away from the scene before he lost sight of it and whatever he may have said in the past and at the trial on that particular point, which I understand is your point.

Mr. Bailey: It is, your Honor.

The Court: So limiting yourself to that point, you go ahead and get whatever you think I should look at by way of affidavit, and in the meantime Mr. Anderson will transcribe Mr. Price's testimony. He was not recalled, was he? It's all in one appearance?

Mr. Conn: All in one appearance, your Honor.

The Court: And I will look at those the minute they are available, and then have the clerk get in touch with you as to some convenient time for a formal hearing on this motion which has not yet been held.

Mr. Conn: May I ask respectfully if we may be furnished a copy of the testimony—the District Attorney's Office?

The Court: Oh, yes. You are going to have copies of it, anyway, for the appeal, so this is just writing that up ahead of the rest. You might as well make the five copies, Mr. Anderson.

So I guess that's all we can do this morning, unless you can think of something else, gentlemen.

Mr. Conn: Do you feel, your Honor—I hope I'm not covering ground that's already been covered, but do you feel you would prefer the procedural aspect of the taking of the affidavits, et cetera, to be worked out between the District Attorney's Office and counsel for the defendant?

The Court: I don't care, if you can work it out. If you can work out the history of Price's several versions, if there were several versions, and agree on them, so much the better. If you can't, why I will take the affidavits as presumably true and decide whether or not on those I see no basis for granting the motion or whether on those I see a basis in my discretion for requesting testimony.

Mr. Conn: Yes, your Honor. I think that states my position at the moment as clearly as I can do it.

The Court: If you have any question, let me know right now.

Mr. Bailey: All right, your Honor. Suppose we do this: Suppose we make a stipulation which is competent evidence—

The Court: Suppose what?

Mr. Bailey: We make a stipulation of fact, if we are able to do so.

The Court: Sure.

Mr. Bailey: It may be that Mr. Conn, having been furnished just this morning with a copy of my offer of proof, can, through his investigators, verify each allegation of fact in it, or most of them, and we can furnish you with a stipulation.

The Court: If he can, that can be a stipulation which I will accept, consider, and then decide whether or not I should change my mind.

Mr. Bailey: Very well, your Honor.

Mr. Conn: I think that is an excellent method of approach, your Honor. I will endeavor to use the facilities available to the District Attorney's Office to that end.

The Court: All right. You go ahead and act accordingly, and I will wait for word from you.

Mr. Conn: Yes, your Honor.

The Court: And in the meantime, so that the defendant's rights won't be prejudiced—sometimes there is a separate request for a hearing on a motion for a new trial, but since the motion itself requests a hearing to be held, I presume that that would cover the rule. So there won't be any need for a separate request for a hearing. Otherwise we will consider right now Mr. Bailey as making a request for a hearing on this motion.

Mr. Bailey: I do, your Honor.

The Court: Get that on the record.

Mr. Bailey: Very well, your Honor. Thank you.

The Court: And at any hearing, of course, we want the defendant here.

Mr. Bailey: The defendant will be present in court.

The Court: The defendant's offer of proof in support of his motion may be filed with the papers.

Mr. Bailey: Very well, your Honor.

The Court: I do not in any way consider this an affidavit.

Mr. Bailey: It wasn't intended to be.

The Court: I understand.

Mr. Bailey: Might I ask one other thing, your Honor? You made a tentative ruling on certain kinds of evidence I propose to offer which you wouldn't hear.

The Court: That's because of your statement to me that as far as admissible evidence goes, this is very important.

Mr. Bailey: Yes, I understand. I wonder if you might protect my rights on whether or not—since you have indicated there may be precious little precedent, whether or not your Honor would have the legal right to accept this and let it influence his judgment, I wonder if I might prepare a written offer of proof and have you exclude it or I can make it at the bench during the hearing.

The Court: You can file anything with me you want and I will look at it. How much attention I will pay to it is something that I will decide when the time comes.

Mr. Bailey: Very well.

Affidavit of Wayne C. Kruntorad.

January 12, 1965

I, Wayne C. Kruntorad, Sergeant First Class, United States Army, depose and say under oath that on or about the thirteenth of November, 1964, I was present when Pvt E-2 Thomas S. Price, RA 12 701 384, presently stationed at Fort Devens, Massachusetts, was interviewed by investigators from the Massachusetts State Police in the investigations section of the Provost Marshal's office. During this interview, Price was asked by one of the investigators if he noticed the location of the State Police cruiser as he was hitch-hiking towards Fort Devens. To the best

of my knowledge, Price stated that the police *crusier* had not moved from the position where Travis K. Stone had been stopped by the State Police officer. On the sixth of January, 1965, I was present in the investigations section of the Provost Marshal's office at Fort Devens when Daniel Bloomfield Jr., a private investigator, interviewed Price with respect to the testimony he had given during the trial of State Police officer Myles *Heffernon,* Price stating that he had testified that the police cruiser had moved from the location that it had been when Stone was stopped. At this time, Price told Bloomfield that he was now unsure as to whether the cruiser had moved or not.

WAYNE C. KRUNTORAD
SFC, U.S. Army

Subscribed and sworn to before me

EMMANUEL S. PERCH
NotRY Public
My commission expires
28 April 1967

Affidavit of Thomas M. Price.

January 13, 1965

Having been advised of my rights under Article 31 of the Uniform Code of Military Justice, I, Thomas M. Price, RA 19 800 620, Company C, 2d Battalion, 2d Infantry, United States Army, presently stationed at Fort Devens, Massachusetts, depose and say under oath that on the day that Travis K. Stone was apprehended on Route #2 by State Police officer Myles *Heffernon,* I was a passenger in Stone's vehicle, and that after Stone had climbed into the police cruiser, I crossed Route #2 and walked back towards Fort Devens approximately one quarter of a mile and hitch-

hiked a ride in a passing vehicle; and that some time *bewteen* the time I began walking back towards Fort Devens and the time that I was picked up by the passing vehicle, I turned and observed the police cruiser moving away from me, that is to say, in the opposite direction, and that although I couldn't see Stone in the cruiser, I didn't see him on the road, and although I couldn't tell if he was in his own car, I assume he was still in the cruiser since he didn't stop me. I recall telling a man named Bloomfield in the investigations section of the Provost Marshal's office at Fort Devens a short time ago that I was not certain if I had seen the police cruiser move. I am now certain, however, that I saw the police cruiser move, although I am unable to say how far it moved, and that my testimony given at the trial of Trooper *Heffernon* was correct. I don't recall saying to anyone prior to the trial that I had not seen the cruiser move.

THOMAS M. PRICE
Private First Class, U.S. Army

Subscribed and sworn to before me this date

JAMES E. THOMAS
1st Lieutenant, CE
Summary Court Officer

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT
Notary Public
My commission expires
May 15, 1965

Filed Feb. 9, 1965

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT

CRIMINAL No. 71535

COMMONWEALTH OF MASSACHUSETTS

vs.

MYLES F. HEFFERNAN

Statement of Case and Rulings on: Defendant's Motion for a New Trial Filed January 7, 1965; Defendant's Requests for Rulings of Law Filed January 26, 1965; and Defendant's Motion to Amend and Supplement his Motion for New Trial Filed February 9, 1965.

This case came on for trial before me without a jury on January 4 and 5, 1965, the defendant having theretofore waived in writing his right to a trial by jury. I saw and heard all of the witnesses, including the defendant who elected to testify; and on such evidence as I considered credible and reasonable inferences drawn therefrom, I found the defendant guilty of the offense charged.

On January 7, 1965, defendant filed his "motion for a new trial" (paper no. 7) together with his unsworn-to "offer of proof in support of his motion for new trial". (paper no. 8.) Defendant filed his "request for rulings of law" (paper no. 9) on January 26, 1965, together with five affidavits (paper no. 10) "to support (his) motion for new trial". On January 28, 1965, a hearing was held on defendant's said motion for a new trial. (See transcript January 28, 1965, pages 2 through 31.)

While a decision on said motion was under advisement, defendant, pursuant to leave, on February 9, 1965, filed his "motion to amend and supplement . . . (his) motion for new trial". (paper no. 11.) On February 11, 1965, I conferred with both counsel, and I then advised counsel

for defendant that "regardless of the murder case then on trial (before me), I would give him a hearing during some late afternoon, if he wished . . ." (Transcript of hearing on February 25, 1965, page 2.)

A further hearing was held on February 25, 1965 on the said motion to amend and supplement (paper no. 11). After further consideration of all of the foregoing, the following rulings are now made:

A. Defendant's motion to amend and supplement (paper no. 11) is allowed solely for the purpose of thereby incorporating into the motion for a new trial (paper no. 7) the affidavits annexed to said motion to amend and supplement (paper no. 11). Insofar as defendant's said motion to amend and supplement (paper no. 11) "further moves that the (c)ourt hold a hearing to inquire into the truth of the statements attributed to (w)itness Stone, and into the existence of a conspiracy to commit perjury between (w)itnesses Stone and Price, and that the (c)ourt thereafter set aside the judgment of guilty and order a new trial", the same is denied.

B. Defendant's motion for a new trial (paper no. 7), as amended by the inclusion of the affidavits annexed to his motion to amend and supplement (paper no. 11) as evidence of "newly discovered evidence", is denied in toto.

C. With respect to defendant's request for rulings of law (paper no. 9), the court rules as follows:

1. Not given.
2. Not given.
3. Not given.
4. Even if this request states a correct principle of law, it is not given because it is not applicable to the facts found.
5. Even if this request states a correct principle of law, it is not given because it is not applicable to the facts found.
6. Even if this request states a correct principle of law,

it is not given because it is not applicable to the facts found.
7. Not given because this request involves in part a finding of fact; and because, even if given, it would not affect the findings on which the ultimate finding of guilty was based.
8. Not given because this request is predicated on an assumption of fact, and because the principle of law here stated is not applicable to the facts found.
9. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.
10. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.
11. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.

CHARLES S. BOLSTER
Justice of the Superior Court

March 3, 1965

Filed Mar. 4, 1965

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT.

COMMONWEALTH

vs.

MYLES F. HEFFERNAN

No. 71535

Docket Entries.

Charge—Violation of Conduct of Public Official.

Atty. for Deft.:
F. Lee Bailey
40 Court Street
Boston, Mass.
Robert A. Barton
40 Court Street
Boston, Mass.

No. of Paper	Date of Entry	Docket Entries
1	1964, Dec. 9	Indictment.
	1964, Dec. 16	Defendant is arraigned and pleads Not Guilty. Defendant is ordered to personally recognize in the Sum of $100.00 and so recognizes in open Court.
	1964, Dec. 16	Continued to January 4, 1965.
2	1965, Jan. 4	Defendant's Waiver of Trial by Jury, filed in Court.
3	1965, Jan. 5	Finding of Bolster, J. GUILTY.
4	1965, Jan. 5	Reporting Evidence—Under the Provisions of General Laws (Ter. Ed.) Chapter 278, Section 33A to G inclusive, as amended the Superior Court appoints

			Donald O. Anderson Stenographer to take the Evidence. (Bolster, J.)
	1965, Jan.	5	COMMONWEALTH MOVES FOR SENTENCE.
	1965, Jan.	5	Defendant as principle and John Fleming as surety recognizes in $100.00 and on probation two years. By the Court, Bolster, J.
	1965, Jan.	5	Probation previously imposed on this day is this day revoked. SENTENCE: $100.00 Fine. Execution of the within Sentence is hereby Stayed until thirty days after receipt of rescript, or ninety days from this date, whichever is later. By the Court, Bolster, J.
5	1965, Jan.	6	Defendant's Claim of Appeal. Notice delivered to Judge Bolster and John J. Droney, District Attorney.
6	1965, Jan.	6	The defendant having filed a CLAIM OF APPEAL in the above entitled case, it is hereby ordered that Donald O. Anderson, Court Stenographer designated by the Court, prepare five copies of the "Transcript of Testimony under the provisions of Chapter 278, Sections 33A-33G of the General Laws. (Ter. Ed.)
7	1965, Jan.	7	Defendant's Motion for a New Trial.

	1965, Jan.	7	Notice delivered to District Attorney and Judge Bolster.
8	1965, Jan.	7	Defendant's offer of the proof in Support of his Motion for New Trial.
9	1965, Jan.	26	Defendant's Request for Rulings of Law.
10	1965, Jan.	26	Affidavit to Support Motion for New Trial.
11	1965, Feb.	9	Defendant's Motion to Amend and Supplement Defendant's Motion for New Trial.
12	1965, Mar.	4	Statement of Case and Rulings by Justice Bolster on: Defendant's Motion for New Trial filed January 7, 1965: Defendant's Requests for Rulings of Law filed January 26, 1965 and Defendant's Motion to Amend and Supplement his Motion for New Trial filed February 9, 1965.
	1965, Mar.	4	Notice mailed to Attorney for the Defendant and District Attorney.
13	1965, Mar.	10	Defendant's Claim of Exceptions to Denial of Motion for New Trial: Denial of Defendant's Requests for Rulings of Law and the Denial of Defendant's Motion to Amend and Supplement his Motion for New Trial.
			Notice delivered to District Attorney and Judge Bolster.
14	1965, Mar.	10	Defendant's Claim of Appeal.
			Notice delivered to District Attorney and Judge Bolster.

15	1965 Mar. 15	Two sets of the "Transcript of the Evidence" delivered to the Clerk of Courts this day.
16	1965, Mar. 15	Two sets of the "Transcript of the Evidence" (Informal Hearing on Motion for New Trial) delivered to the Clerk of Courts this day.
17	1965, Mar. 15	Two sets of the "Transcript of the Evidence" (Motion for New Trial) delivered to the Clerk of Courts this day.
18	1965, Mar. 15	Two sets of the "Transcript of the Evidence" (Hearing on Defendant's Motion to Amend and Supplement Defendant's Motion for New Trial) delivered to the Clerk of Courts this day.
19	1965, Apr. 14	Summary of the Record, written notice sent to Counsel of Record and District Attorney.
20	1965, Apr. 14	Certificate of Calvin A. Burger, Assistant Clerk of the Superior Court of the Completion of the Summary of the Record and notice sent to Counsel of Record and District Attorney.
21	1965, Apr. 26	Defendant's Motion to Extend Time for Filing Assignments of Error be extended to and including May 6, 1965.
22	1965, May 6	Defendant's Assignments of Error.

Opinion of the Supreme Judicial Court.

COMMONWEALTH *vs.* MYLES F. HEFFERNAN.

Middlesex. October 4, 1965.—January 4, 1966.

Present: SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

REARDON, J. This is an appeal under G.L. c. 278, §§ 33A-33G, as amended, from the conviction of the defendant by a judge sitting without jury in the Superior Court. The defendant had been indicted under G.L. c. 268A, § 2 (d), in that he, being a State trooper, "did corruptly ask for and receive something of value for himself in return for being influenced in the performance of an official act."

It is undisputed that on the morning of November 1, 1964, while driving easterly on Route 2 in Concord, Travis K. Stone and Thomas M. Price, both army privates at Fort Devens, were stopped by the defendant and that Stone was the operator of the car. Although it had one registration plate attached, the car was in fact unregistered and uninsured. Stone was found by the defendant to be operating without an inspection sticker. Conversation ensued between Stone and the defendant, during which Price left and returned to Fort Devens by hitchhiking. There was conflicting testimony as to whether the police cruiser containing the defendant and Stone drove off prior to the departure of Price. It was testified by Stone and denied by the defendant that sometime later, in the cruiser, the defendant said to Stone, "If you would give me enough money to buy two fifths of Canadian Club Whiskey, I will let you go," and that Stone gave Heffernan $9 in response to this request. It is undisputed that Heffernan, at 8:30 A.M., made a radio transmission calling for a wrecker to tow the car which he termed "abandoned."

We turn to a consideration of the exceptions taken during trial and those relating to the denial of the defendant's amended motion for a new trial, including the denial of certain "requests for rulings of law." The defendant has assigned as error twelve matters.

1. The defendant complains of the judge's exclusion of a question which had reference to an appearance by Stone in the Concord District Court sometime prior to trial. The question was, "Did you refuse to testify [in that appearance] on the grounds that you might incriminate yourself?" The intention of defence counsel was to offer the evidence of a claim of the privilege against self-incrimination for the purpose of impeaching Stone's previous testimony that he had had a civic motive in informing certain police officials regarding the alleged bribe. There is no need to pass upon the defendant's contention based on the witness's privilege against self-incrimination. We hold the judge's ruling to be proper on the basis of his broad discretion to make rulings on the scope of cross-examination on collateral facts which reflect on credibility. *Commonwealth* v. *Sacket,* 22 Pick. 394, 396. *Commonwealth* v. *Patalano,* 254 Mass. 69, 72. *Commonwealth* v. *Makarewicz,* 333 Mass. 575, 593. *Commonwealth* v. *Palladino,* 346 Mass. 720, 723. Further, shortly after taking the exception, the defence counsel elicited testimony from Stone tending to show that he had claimed the privilege. *Commonwealth* v. *Corcoran,* 252 Mass. 465, 486. *Commonwealth* v. *Beal,* 314 Mass. 210, 229. *Commonwealth* v. *Makarewicz,* 333 Mass. 575, 593. *Commonwealth* v. *Palladino,* 346 Mass. 720, 723.

2. During cross-examination of Stone he admitted that he had talked with a number of officers of the law about the case. He said that right after the alleged bribe he had "conversation" with a person who gave him a ride to his car and with the service station attendant where

he left his car. Concerning these two, who were not officers, his answers did not imply that he had discussed the bribe with them. Defence counsel examined Stone's motive for not reporting the alleged bribe until he was arrested on a charge not related to this case, counsel's theory being that the bribe was an invention to discourage the Ayer police from prosecution of Stone on the charge against him. On redirect examination the Commonwealth attempted to dispel the implication that the story was an invention springing from the arrest. After the prosecution asked whether Stone had conferred with anyone about the alleged bribe on arriving at his barracks on the first of November, 1964, defence counsel objected. The judge permitted the answer, "Yes." The next question was, "And with whom did you confer?" Again defence counsel objected but the judge allowed the question. The defendant responded, "PFC Price and—." Defence counsel then interrupted with his exception, "Would you save my rights on this, your Honor?" The witness continued, "PFC Price and—well, almost everyone in the barracks heard about it sooner or later." Counsel said, "I object to that and move it be stricken." The judge replied, "That last may be stricken out."

The Commonwealth urged that defence counsel's two objections and his single tardy exception were not taken in a manner which would permit his challenging the questions or answers in this court. *Randall* v. *Peerless Motor Car Co.*, 212 Mass. 352, 384. *Commonwealth* v. *Gray*, 314 Mass. 96, 102. G.L. c. 278, § 33B. Rule 72 of the Superior Court (1954). See *Commonwealth* v. *McGarty*, 323 Mass. 435, 439; *State* v. *Laundy*, 103 Ore. 443, 505-506.

Putting to one side the tardiness of the exception, we note that the question and answer were both proper. "It is the general rule that a witness cannot be corroborated by showing that he has previously made statements simi-

lar to those given by him at the trial. . . . But there is an exception where it is claimed that the testimony is a recent invention or fabrication. . . ." *Walsh* v. *Wyman Lunch Co.* 244 Mass. 407, 409.

During the closing argument the prosecution adverted to the conversation between Stone and Price in the barracks concerning the alleged bribe. It was permissible, in the light of what we have already stated concerning this evidence, for the judge in making his findings to give such weight as he deemed warranted to the occurrence of this barracks conversation. *Damon* v. *Carrol,* 163 Mass. 404, 409. *Hubbard* v. *Allyn,* 200 Mass. 166, 171. *O'Kane* v. *Travelers Ins. Co.* 337 Mass. 182, 184. The prosecution's use of the statement in argument, analogizing it to "fresh complaint," was not improper argument since it was not "unfair, prejudicial and unwarranted." *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 28. See *Commonwealth* v. *Cabot,* 241 Mass. 131, 147-148.

3. We turn now to the problem of the denial of the defendant's amended motion for a new trial. The disposition of the motion as originally made hinged upon the affidavits of army personnel and of the defendant's own investigator. These affidavits were offered to prove that Price had stated on two occasions prior to the trial that he had never seen the police cruiser move. Price said at the trial that he had seen the cruiser move.

The defence argued that if Price's testimony were not credible (a) the conviction would be against the weight of the evidence, (b) there would be insufficient evidence to support the conviction, and (c) the action of a State police major, one Murgia, in failing to reveal the potentially impeaching fact of Price's deviation from his previous story was such a withholding of evidence that the conviction was as a matter of law vitiated under the Fourteenth Amendment of the Constitution of the United States, even

though there might be sufficient other evidence to support the conviction.

Subsequent to the motion and requests for rulings of law, the defendant filed the amendment to his motion, later incorporated into the motion by the trial judge. The affidavits supporting the amendment to the motion for a new trial were from six service men who gave testimony therein concerning obscene statements made by Stone following the conviction of the defendant and tending to indicate his pleasure at the result. It was argued that these affidavits were new evidence which, combined with the earlier ones, indicated that Stone harbored a malice toward the defendant which was his prime motive in reporting the bribe—that his motive was not inspired by a citizen's duty. The defendant also urged that the affidavits substantiated the existence of a conspiracy between Stone and Price to perjure themselves and harm the defendant.

We consider both sets of affidavits in the light of the well known rules concerning new evidence. *Davis* v. *Boston Elev. Ry.* 235 Mass. 482, 495-496. *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 24-25. *Commonwealth* v. *Devereaux,* 257 Mass. 391. *Commonwealth* v. *Sacco,* 259 Mass. 128, 136. The weight and import of the affidavits submitted in support of the defendant's motion were for the trial judge's discretion. *Commonwealth* v. *Crapo,* 212 Mass. 209, 210. *Sherman* v. *Collingwood,* 221 Mass. 9, 12-13. *Berggren* v. *Mutual Life Ins. Co.* 231 Mass. 173, 177-178.

The record sufficiently indicates the difficulty of the case which the trial judge had to decide but "it is not for us to determine what is to be believed. The question for us is: Could the judge conscientiously, intelligently and honestly have reached the result he has reached?" *Commonwealth* v. *Sacco,* 259 Mass. 128, 140, citing *Davis* v.

Boston Elev. Ry. 235 Mass. 482, 502. While there were many witnesses who testified in the two days of trial, the defendant's guilt or innocence depended upon the value which the trial judge placed upon the testimony of the defendant as against that of the witness Stone, the only persons in a position to give direct testimony on the subject matter of the indictment. The trial judge saw both of these men. He heard their stories. He was in the best position to ascertain the facts. A careful review of the evidence reveals no abuse of discretion in his refusing the new trial on the grounds that his finding was against the weight of the evidence, or that the evidence was insufficient to sustain the conviction.

It may further be stated that the judge is in his discretion entitled to choose the procedure by which he will consider a motion for a new trial. See *Opinion of the Justices,* 207 Mass. 606, 609; *Commonwealth* v. *Millen,* 290 Mass. 406, 410; *Graustein, petitioner,* 305 Mass. 571, 572; *Commonwealth* v. *Coggins,* 324 Mass. 552, 556-557; *Commonwealth* v. *Shand,* 335 Mass. 764. We are unable to say that the trial judge abused his discretion in not taking oral evidence on the questions of conspiracy to perjure even assuming that the witness Stone made the statements attributed to him. These could have been interpreted as expressions of Stone's great satisfaction in having helped convict the defendant as much as expressions showing that Stone had harbored a prior intent to convict him by any means.

4. The final question has to do with whether there was conduct by the prosecution which so vitiated the conviction as to require a new trial. The defendant contends that a State police major sat through significant testimony by Price which diverged from the story Price had previously told to him.

In his brief the defendant has cited cases concerning suppression of evidence by the prosecution. The leading case

is *Mooney* v. *Holohan,* 294 U. S. 103, 110-113, wherein the Supreme Court of the United States said that the prosecuting attorney's knowing use of "perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony" would constitute a denial of due process of law. *Pyle* v. *Kansas,* 317 U. S. 213. *Alcorta* v. *Texas,* 355 U. S. 28. *Napue* v. *Illinois,* 360 U. S. 264. See *Brady* v. *Maryland,* 373 U. S. 83, 87-88; *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 (4th Cir.).

We are not persuaded that we need consider the questions raised by *Mooney* v. *Holohan, supra.* Here the prosecutor had no knowledge of there being anything amounting to perjury or evidence suppression. Further, in the decisions cited above the perjury or suppression involved matters which could be held to have been material to the result reached below. Here we have the benefit of the trial judge's statement that Price's testimony played no part in the finding.

Moreover, there is a further consideration noted in *Green* v. *United States,* 158 F. Supp. 804, 809 (D. Mass.), affd. 256 F. 2d 483 (1st Cir.), in which it was said by Wyzanski, J., "where at his trial a defendant has knowledge that the prosecutor is knowingly using perjured testimony, and the defendant does not then raise the point, ordinarily he cannot have an adverse judgment set aside on the basis of that prior knowledge." *Price* v. *Johnston,* 334 U. S. 266, 277-278, 291. See *Taylor* v. *United States,* 229 F. 2d 826, 833-834 (8th Cir.); *McDonald* v. *United States,* 282 F. 2d 737, 741 (9th Cir.).

The defendant has argued that Major Murgia was silent at the trial when he heard Price tell a story different in one respect from what Price had previously said to him. However, it does not appear that Murgia or any other member of the prosecution solicited any perjury or suppressed any facts. Rather, it appears that the facts which the defend-

ant claims were suppressed were fully known to his own investigator. If the defendant was harmed it was because of a failure of communication between his investigator and his counsel. Such a failure of communication can in no way be laid to the activities or lack of them on the part of the State's offcers. The defendant's full knowledge of the facts is for us the definitive answer to the defendant's claim of suppression of evidence and related use of perjured testimony.

The judge below thus did not err in refusing the defendant's motion for a new trial on the grounds of the prosecution's having suppressed evidence.

Following consideration of all the defendant's assignments of error we are satisfied that there was no error below.

Judgment affirmed.

F. Lee Bailey (*Robert A. Barton* with him) for the defendant.

Donald L. Conn, Assistant District Attorney (*Ruth I. Abrams,* Assistant District Attorney, with him), for the Commonwealth.